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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 21

CHAMPLIN REFINING COMPANY, *Appellant*,

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION.

REPLY BRIEF FOR CHAMPLIN REFINING COMPANY

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SUBJECT INDEX.

	Page
Reply to Government's Statement	1-7
Reply to Government's Summary of Argument	7-8
Reply to Government's Argument	8-29
Reply to the contention that	
(1) Under the very words of Section 1 of the Act, Appellant is a carrier subject to the provisions of the Act (Br. pp. 10-15)	9-12
Reply to the contention that	
(2) the legislative history of the Hepburn Act * * * leaves no doubt that Appellant's view that the statute applies only to those engaged in transportation "for others" * * * is an erroneous one (Br. pp. 16-18)	12-13
Reply to the contention that	
(3) Appellant falls within the rule of the Valvoline and not that of the Uncle Sam case (Br. pp. 18-28)	13-14
The Government's contention that the exception given the Uncle Sam Company exists only when a company is drawing oil from its own wells to its own refinery and for its own use	14
The Government's contention as to movement of products for sale to the public	15-17
The Government's contention that Appellant makes sales under contract	17-21
The Government's contention that Appellant uses a price formula which includes a "specific charge for transportation"	21-25
Reply to the contention that	
(4) Appellant cannot enjoy the benefits while disclaiming the burdens of common carrier status (Br. p. 28)	25-28

Page

Reply to the contention that

(5) the order violated no constitutional right of Appellant (Br. pp. 31-32) 28-29

Products pipe lines 29-34

Conclusion 35-41

TABLE OF CASES CITED.

Arkadelphia Milling Co. v. *St. Louis & Southwestern Railway Co.*, 249 U. S. 137 21

Atlantic Coast Line R. Co. v. *Standard Oil Co.*, 275 U. S. 257 ..... 18, 20, 21

Buck v. *Kuykendall*, 267 U. S. 307 28

Church of the Holy Trinity v. *United States*, 143 U. S. 457 30

General Oil Company v. *Crain*, 209 U. S. 211 21

Pennsylvania Railway Co. v. *Public Utilities Commission of Ohio*, 298 U. S. 170 ..... 16, 20, 21

Petroleum Rail Shippers Ass'n v. *Alton & Southern Railway*, 243 I.C.C. 589, No. 28106 33

Pierce Oil Corp. v. *Phoenix Refining Co.*, 259 U. S. 125 27

"Pipe Line Cases," 234 U. S. 548 ..... 9, 11, 12, 14

U. S. v. *California*, 297 U. S. 175 26

Valvoline Oil Company v. *United States, et al.*, 308 U. S. 141 ..... 9, 11, 13, 15

Walling v. *Jacksonville Paper Co.*, 317 U. S. 564 20

MISCELLANEOUS CITATIONS.

Boyd's: "Gasoline and What Everyone Should Know About It" 29

Technical Paper No. 516, U. S. Department of Commerce, 1932 ..... 32, 33

"Legal Aspects of Radio Communication and Broadcasting," 40 A. L. R. 1514 ..... 33, 34

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 75

CHAMPLIN REFINING COMPANY, *Appellant*,

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION.

REPLY BRIEF FOR CHAMPLIN REFINING COMPANY

Inasmuch as there appear to be in the brief of the Government,

First, statements of conclusions which are subject to inferences not supported by the record,

and,

Second, erroneous applications of the law to such conclusions,

the Appellant finds it necessary to file its reply to such brief.

For brevity in discussion, the titles and context of the Government's brief will be followed.

* * * *

STATEMENT.

(1) The statement (lines 7-12 incl., p. 3)

> "In lieu of compliance, Appellant filed a petition with the Commission, alleging that it was not a common carrier subject to the provisions of the Interstate Commerce Act and praying that the Commission so determine (R. p. 157)"

is not complete.

Appellant was compelled to file its petition to prevent the orders complained of becoming final and the prayer of its amended petition (R. Vol. I, p. 160) reads as follows:

> " * * * that:
>
> (a) This Commission revoke, rescind, and dismiss the orders of Ernest I. Lewis, Director, dated May 15, 1941;
>
> and further prays that:
>
> (b) The Commission proceed to determine,
>
> (1) That petitioner is not a common carrier,
>
> (2) That petitioner operates a private pipe line,
>
> (3) That petitioner is not a pipe line company, and
>
> (4) That petitioner is not engaged in transportation within the meaning of the Interstate Commerce Act;
>
> and finally prays that:
>
> (c) Petitioner be relieved of the requirement of filing valuation reports as directed by the orders of May 15, 1941, and

(d) That a final order be entered adjudging that petitioner be relieved of filing any report or reports for valuation or rate-making purposes."

(2) Exception is taken by the Appellant to the breadth of the statement made in note 2 at the bottom of page 4.

The Appellant does not question the findings of fact by the Commission, except the Commission's conclusion with relation to "differentials" which is interpreted by counsel for the Government to justify the contention that the "differential" is the application of "a distinct charge for transportation." (Govt. Br. pp. 8, 9, 24, 25.)

The Appellant has at all times contended otherwise as the record fully reveals.

To prevent repetition in discussion, an analysis of the "differential" question will be later made in connection with subsequent comment thereon by the Government.

(3) Reference is made to the statement in the last paragraph on page 4, that Appellant's "charter authorizes it to *transport** petroleum (R. 427)." The charter does *not* authorize it to do so as a common carrier.**

(4) Exception is taken to the innuendo of the statement, (top of page 5):

> "Besides *operating this pipe line*, Appellant is engaged in the refining, distribution, and sale of petroleum products in interstate commerce as an integrated oil company,"

which, if not so intended, is clearly misplaced emphasis.

Compared with its principal business of producing and

---

* Emphasis here and throughout this brief is supplied, unless otherwise indicated.

** It is of significance that notwithstanding the Interstate Commerce Commission argued in this Court (R. Vol. II, p. 829), in the *Uncle Sam Case*, that "its charter permits it to transport oil *as a common carrier*," such authorization did not preclude this Court from holding that company not to be a common carrier under the Act.

refining crude oil and marketing the products thereof, the pipe line operation is an incident (R. Vol. I, p. 167). The pipe line represents about one-eighth of Appellant's capital investment (R. Vol. II, p. 525).

(5) The statement at the beginning of paragraph 2, page 5, which reads as follows,

> "Appellant's pipe line is known as a 'products' pipe line, which is used for transportation of refined petroleum products only (R. p. 165)"

is in need of amplification and factual background, which will be considered in a discussion of its related phases in the Argument herein, *post*, pp. 29-34.

(6) The statement at the top of page 6, with reference to the source of the Champlin supply of "crude" oil for manufacturing purposes, should be amplified to state that all crude oil processed at the Enid refinery is produced in Oklahoma and that the Cimarron Valley Pipe Line Company does not cross any state line, but does all of its gathering wholly within the State of Oklahoma.

(7) The statement as to Cimarron's activities in instituting condemnation suits in Kansas, page 6, requires clarification.

The uncontradicted testimony of the witness, Leverton, (R. Vol. I, pp. 176-177) is quoted in this connection as follows:

> "50 Q. When did you first learn of the proposal to make the Cimarron Valley Pipe Line Company a common carrier in the operation of the products pipe line then in course of construction?
>
> "A. About April 15, 1935, when my attention was directed to correspondence concerning four condemnation suits which had been filed against seven persons in four counties in the State of Kansas.
>
> "51 Q. What did you do with regard to such proposal?

"A. I immediately directed Mr. Champlin's attention (fol. 282) to the complications that would arise in the operation of a products line, as a common carrier and recommended settlement at once with all persons involved in such litigation and the dismissal of such cases.

"52 Q. Now, please state what further steps were taken to avoid such responsibility.

"A. The condemnation suits that had been instituted were dismissed and *satisfactory* settlements were made with such land owners.

"Assignments of the rights-of-way from the Cimarron Pipe Line Company to Champlin Refining Company, conveying the entire right-of-way of such line were executed on June 10, 1935, and immediately recorded in the county seats of all counties in which such rights-of-way were granted.

"A bill of sale was at the same time executed by Cimarron Valley Pipe Line Company conveying all of its right, title and interest in and to said pipe line and its facilities to Champlin Refining Company, which was recorded in the office of the County Clerk of Garfield County, Oklahoma.

"The Champlin Refining Company, having advanced all funds necessary for the purchase of equipment and construction of the pipe line and its facilities, thereupon cancelled its charges against Cimarron Valley Pipe Line Company. The Champlin Refining Company took over the completion of the pipe line system and operated it *from the first day of its use*. When the licenses that had (fol. 283) been granted to Cimarron Valley Pipe Line Company in Kansas and in Nebraska expired in 1936, that corporation withdrew from both states."

(8) Reference is made, page 7, to the new permit for construction issued by the State of Iowa (R. p. 483) concerning which it is said, that:

"The new permit, however, still contained provisions authorizing the company to use the property of others. (R. 485.)"

We do not so interpret the permit.

The new or amended Iowa permit only authorized Appellant to exercise the common right to use the public highways, with consent of the proper public officials, and to acquire property rights from private owners; but it expressly withheld the power of eminent domain (R. Vol. II, pp. 484-485). The record affirmatively shows that Appellant obtained from the proper officials of Iowa, consent to cross public highways (R. Vol. II, pp. 473-475, 476-478). Like permission was obtained in all other states (R. Vol. I, pp. 434-442, Vol. II, pp. 443-473), for the entire right-of-way used.

(9) The unsoundness of the statement at the top of page 8, that,

> "This 'differential' is an amount equal to the through rail rate from Enid to purchaser's destination, minus the charges paid out by the purchaser for short haul transportation from Appellant's pipe line terminal to destination, (R. 253-255),"

and of the statement at page 24, that,

> "Since the product transported and sold by appellant is identical, insofar as its nature or processing is concerned, at both ends of the pipe line, this difference in value or market price at origin and at destination is attributable entirely to transportation, and is in fact calculated in terms of rail freight rates. It is idle for appellant, which furnishes part of such transportation and collects a specific charge therefor, to contend that this amount paid by the purchaser is not a charge made for transportation and not one which operates to compensate it for transporting the product from Enid through the pipe line to the respective terminals."

and of the conclusion of the Commission quoted at the top of page 25, that,

> "'The differential, therefore, represents the charge assessed by the Champlin for transporting petroleum products through its pipe line from the refinery to the

> pipe line terminal' (R. 59), and that 'Champlin is willing to sell its products to any part of the consuming public that can avail itself of the Champlin's facilities, provided the purchaser will agree to pay to the Champlin, under contract or spot sales, the so-called differential as compensation to the Champlin for transporting the product from Enid through the pipe line to the respective terminals,' such differential being added to the Enid price of the product 'in the sale of all products transported through the pipe line' (R. 66),"

will be demonstrated in our Argument, *post*, pp. 21-25.

SUMMARY OF ARGUMENT.

Appellant does not question the Government's right to summarize its argument as it deems proper. However, the assumption, p. 9,

> "That appellant makes a *distinct charge* for transportation by way of the pipe line is striking evidence that, in substance, it is serving the public just as much as if title to the *petroleum* vested in the purchaser before passage through the pipe line,"

is foreign to the facts which are indisputably shown in the record.

The Appellant does not make a "distinct charge for transportation," nor does it haul "petroleum" in its products pipe line.

With regard to II of the Summary of Argument, page 9, Appellant says that the definite purpose of the Commission is to compel the Appellant to publish tariffs and assume the obligations of a common carrier.

The filing of a report is merely the first step incidental to such final action.

The Appellant sought to show by the witness, J. J. Dunlevy, R. Vol. I, p. 133, (the manager of the Valvoline Pipe Lines Department) the circumstances under which Valvoline was required to file tariffs and become a common carrier.

Valvoline had received a letter dated October 11, 1941, from Thurman Arnold, Attorney for the Department of Justice, which Appellant was not permitted to introduce in evidence (R. Vol. I, p. 132), after the receipt of which Valvoline filed its tariffs.

Upon cross examination, the witness stated that,

> "we were required by Thurman Arnold to file tariffs * * * ," (R. Vol. I, p. 133.)

The matter was quite important with the Valvoline Company, inasmuch as it required a year's time and the approximate expenditure of $25,000.00 (R. Vol. I, p. 131) to prepare the required report data and so it will be, in the event of an adverse decision, with this Appellant.

In the *Valvoline* case this Court assumed that no detriment would result to that company by compliance with the valuation orders, and that Valvoline's constitutional rights would not be thereby impaired. Subsequent developments have proved otherwise. It now appears that compliance with those orders was but the initial step in compelling Valvoline to assume common carrier obligations; and its losses in time and money constituted in themselves a very real deprivation. Appellant therefore solemnly protests against its constitutional rights being adjudicated upon the assumption that no deprivation of its property will result from the filing of such report.

ARGUMENT.

The Government's brief narrows the issues. It presents the contentions:

> (1) under the very words of Section 1 of the Act, Appellant is a carrier subject to the provisions of the Act (Br. pp. 10-15);
>
> (2) the legislative history of the Hepburn Act * * * leaves no doubt that Appellant's view that the statute applies only to those engaged in transportation "for others" * * * is an erroneous one (Br. pp. 16-18);

(3) Appellant falls within the rule of the *Valvoline* and not that of the *Uncle Sam* case (Br. pp. 18-28);

(4) Appellant cannot enjoy the benefits but (*sic*) disclaim the burdens of common carrier status (Br. pp. 28-30); and,

(5) the order violated no constitutional right of Appellant (Br. pp. 31-32).

Reply to the contention that

(1) Under the very words of Section 1 of the Act, Appellant is a carrier subject to the provisions of the Act (Br. pp. 10-15).

The contention that the very words of Section 1 of the Act make Appellant a "common carrier," is founded on the fact that subsection (3) of Section 1, defines the term "common carriers" to include "all pipe line companies." Without attempting to determine the sense in which the latter term was used, the Government asserts that Appellant is a pipe line company, and, on the basis of that assertion, draws the deduction that Appellant is a "common carrier" subject to the Act. This assertion ignores the equally important requirement of the Act that Appellant must also be engaged in "transportation" as that term is used in the Act.

The Government presented the same contention in the *Valvoline* case (R. Vol. II, pp. 899-900, 905), but the case was not decided on that basis, for Mr. Justice Reed there said,

> "* * * it is the purchase from many sources and subsequent carriage that determines the applicability of the statute to Valvoline."

In the *Pipe Line Cases*, the Government contended that the Act made all interstate oil-carrying pipe lines common carriers (234 U. S. 549; R. Vol. II, p. 712). The holding

that the Uncle Sam Oil Company was not under the Act was a rejection of this contention.

Relying upon the statutory definition of "common carrier," the Government quotes from the *Valvoline* case the reference to such definition. This portion of the opinion reads in its entirety as follows:

> "There is no controversy over whether appellant is an interstate pipe line company. Obviously it is. The contentions above are advanced to show it is not subject to the Act. Section 1 (3) defines common carrier to include 'all pipe-line companies.' If this definition is not limited by the subsequent clause 'engaged . . . as common carriers for hire,' extended consideration of these characteristics of a private carrier is unnecessary as the language of the definition is decisive."

The Government treats this statement as a holding that any company which owns an oil-carrying pipe line that crosses state lines is a common carrier under the Act, without regard to the use to which the pipe line is devoted. This view ignores the basis upon which the *Valvoline* case was decided.

In this part of the Valvoline opinion, the Court obviously had in mind pipe line companies that engaged in "transportation" within the meaning of the Act. This is clear from the balance of the opinion. Following the quoted part of the opinion, reference was made to the *Pipe Line Cases*, including the holding that the Hepburn Amendment was designed "to cover those who were common carriers in substance, even if not in technical form." Then after stating that the Court did not perceive any change in meaning between the Hepburn Amendment and the Amendment of 1920, and after directing attention to the fact that the operation of the Uncle Sam Oil Company "was held not to be transportation under the Act," the issue of whether or not Valvoline was subject to the Act was determined by the holding that "it is the purchase from many sources and subsequent carriage that determine the applicability of the statute to Valvoline."

Valvoline, therefore, was not held to be subject to the Act because it was a pipe line company, but because it was a carrier engaged in "transportation" of a character that came within the meaning of that term as used in the Act. The case, therefore, is not authority that any company which owns an interstate oil-carrying pipe line is a common carrier under the Act. Before a pipe line owner may become subject to the Act, the pipe line must be devoted by its owner to the type of transportation at which the Act was directed—transportation for others, for only in that type of transportation could there be an opportunity for any of the abuses which the Act was designed to correct. It is not necessary that the line be a common carrier in form; it is necessary, however, that it carry for others and it is significant that in the cases in which this Court has held the Act applicable the carrier involved was actually a common carrier in fact, although not necessarily a common carrier in form.

The issue of Valvoline's being under the Act was settled upon the same principle upon which the Court had in the *Pipe Line Cases* held that the Standard Oil Company and its affiliates were subject to the Act. The fact that there was "no controversy over whether Appellant (Valvoline) is an interstate pipe line company," was not determinative of the case. To come within the Act, there had to be, first, a pipe line company and, second, a pipe line company engaged in "transportation" within the meaning of the Act. To be "transportation" within the meaning of the Act, it had to be the type of carriage at which the Act was directed. Valvoline served 9020 wells owned by many persons (R. Vol. II, p. 940) in three states. The producers in the oil field had a commodity to be moved. Valvoline contended in its brief that the trunk line common carriers could not afford to connect with these 9020 small wells (R. Vol. II, p. 946), and that it was supplying the sole practical means of transportation to these producers. The transfer of title did not affect the basic facts. The purchase from

so many producers and subsequent interstate carriage brought Valvoline within the Act.

The purpose of the Act was to prevent unreasonable charges, rebates, discriminations and other abuses by those engaged in "transportation"—abuses by carriers against shippers and passengers. If any language of the Act were construed to bring within the terms of the Act any person who does not sustain to others the relation of carrier to shipper or carrier to passenger, such language would be out of harmony with the purpose of the Act.

In support of its contentions that Section 1 brings all pipe line companies within the Act, the Government quotes from the *Pipe Line Cases*, the statement that "The provisions of the Act are to apply to any person engaged in the transportation of oil by means of pipe lines." An effort is made to apply the sentence [illegible]. The sentence cannot be applied as though [illegible] in a vacuum. It must be read as part of an opinion which held that the Uncle Sam Company was not within the Act though engaged in moving oil from one state to another by means of pipe line. In the quoted sentence the Court patently used the word "transportation" in the sense in which it is used in the Act, and evidently had that meaning in mind when it said that the Uncle Sam Company operations were not "within the description of the Act."

Reply to the contention that

(2) the legislative history of the Hepburn Act * * * leaves no doubt that Appellant's view that the statute applies only to those engaged in transportation "for others" * * * is an erroneous one (Br. pp. 16-18)

The Government does not attempt to answer Appellant's argument (Appellant's Br. pp. 9-25) that the coverage of the Act is limited to transportation for others. The Government's argument (Br. p. 16) that the Act should not be so limited, is restricted to excerpts from the Congressional debates.

Material can be found in these debates to support the view that the Act represents an attempt to reach all interstate oil-carrying pipe lines, private and public alike, and to support a contrary view. Whatever deductions may be drawn from these debates, it appears that the Senator in charge of the measure seemed to have some doubt as to the meaning of the language in which the pipe line clause was cast and foresaw the necessity for judicial construction (Br. 18). That necessity came and the clause has been construed by this Court, but never to include any except those who were common carriers in fact. The Court has twice in the past been asked to construe it as the Government now urges that it should be construed, and has twice rejected the requested construction. No doubt in each of those instances the Court had in mind, as the Court must now have in mind, the clash that would come between the Fifth Amendment and the Act if the latter were given the meaning contended for by the Government. It is clear from the Chief Justice's concurring opinion in the *Pipe Line Cases* that the question of the validity of the Act, if construed as the Government now urges, was considered by at least one member of the Court; and the mention of that subject in his concurring opinion suggests, if it does not reveal, that the exclusion of the Uncle Sam Oil Company was necessary to save the pipe line clause as valid legislation.

Reply to the contention that

(3) Appellant falls within the rule of the Valvoline and not that of the Uncle Sam case (Br. pp. 18-28)

In an attempt to avoid the force of the holding as to the Uncle Sam operations, the Government asserts that it does not apply to Appellant,

(1) because "the exception exists only when a company is drawing oil from its own wells, to its own refinery, and for its own use," (Br. 20);

(2) because Appellant moves its products for sale to the public, (Br. 20-24);

(3) because Appellant makes sales under contract, (Br. 22); and

(4) because Appellant uses a price formula which includes a "specific charge for transportation," (Br. 8, 24-25).

The Government's contention that the exception given the Uncle Sam Company exists only when a company is drawing oil from its own wells to its own refinery and for its own use.

The argument, that the holding as to the Uncle Sam Company applies only when the oil is moved from the pipe line owner's wells to the pipe line owner's refinery, misses the basis and reason for the holding. The Act is directed at transportation for others, and the Uncle Sam Oil Company operations were not within the Act because they were not the type of "transportation" at which the Act was directed, and the principle is not confined to an owner's moving his oil from his wells to his refinery. In logic and in reason the principle applies as well to an owner's moving his gasoline from his refinery to his storage tanks as it does to an owner's moving his oil from his wells to his refinery. All gasoline is now manufactured for use and for sale. Suppose the refinery is in one state and the storage tanks are three miles distant, but in another state. It would appear foolish to contend that the movement of the gasoline by private pipe line from the refinery to storage would be under the Act. Distance of interstate movement cannot be made the criterion for determining that the movement is or is not covered by the Act. Whether the movement is or is not transportation for others is the only criterion for determining the applicability of the Act to any such interstate movement of oil by pipe line. When that criterion is put out of sight, the Act becomes a confused piece of legislation which cannot be applied with proper observance of the limitations of the Fifth Amendment.

The Government's contention as to movement of products for sale to the public.

The fact that Appellant uses its pipe line for the purpose of reaching markets with its products does not determine the applicability of the Act to Appellant's pipe line operations. In the *Valvoline* case (308 U. S. 144-145), in speaking of the operations of Standard Oil Company and its affiliates involved in the *Pipe Line Cases*, the Court said:

> "Whether the oil so owned and transported was ultimately used by the carrier in its own operations or sold to others, was in this connection immaterial."

The Uncle Sam Company like the Standard Oil Company and its affiliates and Valvoline was engaged in manufacturing petroleum products and selling them in states other than the state in which the manufacturing or refining processes were conducted. (R. Vol. II, p. 829.) The Standard Company and Valvoline each sold some of the oil transported before it was refined. The operations of the Standard companies and Valvoline were within the Act; the operations of the Uncle Sam Oil Company were not within the Act. The former companies were carrying everybody's oil to market; the Uncle Sam Company was moving only its own oil. In no instance was the purpose of the transportation or the use made of the oil or the fact that the ultimate purpose was a sale, considered material in determining the applicability of the Act.

Standard and Valvoline were affording to many a means of moving their oil, but a sale of the oil to them was necessary to obtain the benefit of the means of movement. The material difference between the Uncle Sam operations and those of Valvoline and Standard was that the Uncle Sam pipe line was not a means by which the oil of other persons moved to a use and markets. In neither case was the "end use" of the oil material in determining the applicability of the Act. In the *Pipe Line Cases*, Mr. Justice Holmes said that the transportation involved in the Uncle Sam op-

erations was "merely an incident to use at the end." In the *Valvoline* case, Mr. Justice Reed, in distinguishing the facts of that case from the facts of the *Uncle Sam* case referred to the part of the opinion in which the quoted expression appears, but in that connection only said that the Uncle Sam Company's line was used for the sole purpose of moving the company's oil from its wells to its refinery. He did not state that the movement was "merely an incident to use at the end." The omission is significant. The absence in the facts of the *Uncle Sam* case of any element of transportation for others, was alone deemed sufficient to justify the holding as to the Uncle Sam Company and to distinguish that case from the facts of the *Valvoline* case. Likewise the fact that Appellant's pipe line is used to move only products refined by it, is sufficient to distinguish this case from the facts of the *Valvoline* case and to bring this case within the rule applied in the *Uncle Sam Company* case.

The Government's contention, that the fact that a commodity is moved by private means for the purpose of sale controls the question as to whether or not the means of accomplishing movement is within the reach of the Act, is abundantly contradicted by the opinion in *Pennsylvania Railway Co. v. Public Utilities Commission of Ohio*, 298 U. S. 170. There Pittsburgh Coal Company by its private barges and railroad moved coal to its cleaning and sizing plant in another state. The purpose of the movement was to reach markets for the coal. The railroad company contended that the movement was with a continuing intention to deliver the coal to customers in other states and that the movement impelled by that intention was interstate commerce. In that case this Court, speaking through Mr. Justice Cardozo, said that the question before the Court was whether the particular business there involved was subject to regulation under the Interstate Commerce Act, and that the movement from Pennsylvania to the cleaning and sizing plant in Ohio was by private carrier. Although the movement was for the ultimate purpose of sale, Pittsburgh Coal Company was not a common carrier under the Act.

The test of whether or not movement of a commodity is within the coverage of the Interstate Commerce Act is not to be determined by whether or not the commodity is being moved for the purpose of sale, but by whether or not there exists between the one operating the means of accomplishing the movement and the owner of the property the relation of carrier and shipper.

What is said in (3) *infra*, applies with equal force and propriety upon the foregoing discussion.

The Government's contention that Appellant makes sales under contract.

The Government fails to apprehend the basis of the holding that Valvoline was under the Act, while the Uncle Sam Oil Company was not. Failing there, the Government fails to see the analogy between the facts of this case and the facts of the *Uncle Sam* case; and that failure induces the supposition that because Valvoline was subject to the Act Appellant must also be subject, and that Appellant's case is not ruled by the *Uncle Sam* case.

In an attempt to distinguish the facts of this case from the facts of the *Uncle Sam* case, attention is drawn to the fact that Appellant makes "contract" sales of petroleum products. In this connection the statement is made that in such "contract" sales the destination of the products is known before the movement by pipe line. The record shows that Appellant has contracts with a few purchasers for relatively small quantities of products, but careful study of the record fails to disclose any basis for an inference that Appellant knows, before the pipe line movement begins, the destination of any part of its products. Immediately after stating that the ultimate destination is known in the case of "contract" sales, the Government states, (Br. p. 22),

> "In the case of other sales, the petroleum products are shipped in response to a substantial and continuing demand, of such magnitude that at its peak it exceeds

> the capacity of the pipe line for contemporaneous delivery and requires the accumulation in storage of products shipped in advance and held in readiness to fill orders. (R. pp. 207-208, 210.)"

This statement negatives the former statement that in the case of "contract" sales, the destination of the products is known prior to the movement by pipe line. The facts are that the pipe line is so small that its capacity is not sufficient to transport from day to day, quantities adequate to supply the business which Appellant has built up (however, only 3½ per cent of the total sales in the area where Appellant sells its products), and it is necessary in the off seasons to build up storage at the terminals to supply this business in the peak season of consumption, and to continue during the peak seasons to operate the pipe line (R. Vol. I, p. 208). It being necessary to so accumulate in off seasons supplies for sales during the peak seasons, it cannot be known from which particular movement deliveries will be made on any "contract" sale.

The situation in respect to Appellant's "contract" sales has a similarity to one involved in *Atlantic Coast Line R. Co.* v. *Standard Oil Co.*, 275 U. S. 257. Standard Oil Company was buying petroleum and petroleum products from others. The sellers shipped their commodities by tankers to Standard from Tampico and Baton Rouge. Delivery was made to Standard in Florida and the commodities came to rest in bulk in Standard's storage tanks in that state. Later these commodities were sold by Standard and delivered to others in the State of Florida by tank car to bulk stations and by tank wagon to drive-in stations. The rail shipments were made by common carrier railroads to destination in Florida. The railroads contended that the interstate, and not the intrastate, rates should apply to these local shipments from storage to destinations in Florida. This Court held otherwise. The sale and delivery were made in Florida. The commodities having come to rest in Standard's storage tanks, the shipment was not in-

terstate transportation. The sale was not even interstate commerce or interstate commerce under the Interstate Commerce Act. Standard made "contract" sales like Appellant. These had to do with fuel oil. Of them the Court said:

> "Approximately 95 per cent of the fuel oil sold by plaintiff in Florida is on contracts made before the oil has been shipped from the point of origin to plaintiff at Port Tampa and Jacksonville. Most of these are for a period of a year, covering the requirements of the various consumers, with average monthly deliveries stipulated, although in actual practice shipments from the storage tanks to the consumers are accommodated to their needs as under requirement contracts. There is no separation of the fuel oil under contract from that not under contract, all being of the same grade. At the time the shipment of the fuel oil is made from the point of origin, plaintiff cannot say where any particular cargo of same, or any part thereof, will go after it has been pumped into the storage tanks, to whom it will go, or when it will be shipped. At the time of shipment from the point of origin, the only destinations which can be given are Port Tampa and Jacksonville, respectively. (275 U. S. 265.)
>
> "The fuel oil is not different from the other kinds. While the fuel oil is purchased by the plaintiff from a selling company, which has a year's contract, the seller delivers it from Tampico, at the Florida seaboard, as it is likely to be needed to meet the obligations of a number of yearly contracts made by the plaintiff for its delivery in certain parts of Florida. No oil which comes in is labeled or identified in any particular way with any particular company, except after it is shipped to that company from Tampa or Jacksonville. There is no passage of title from plaintiff to the contract purchasers and there is no setting apart of particular oil until the shipments are made at the end of this interval of weeks and months in accordance with the needs of those who have contracted to buy it." (275 U. S. 271)

In contending that the movement "by pipe line for the purposes of distribution in such commerce must be re-

garded as a part of the through movement in interstate commerce beginning at the refinery and ending at the purchaser's place of business" (Br. p. 22), the Government cites *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564. The case was decided under the Fair Labor Standards Act, and not under the Interstate Commerce Act. If the contention were correct, then a shipment by common carrier railroad from Appellant's storage tanks to a purchaser's place of business in the same state would take an interstate rate. The fact that it would not take such rate (*Pennsylvania R. Co.* v. *Public Utilities Commission of Ohio*, 298 U. S. 170; *Atlantic Coast Line R. Co.* v. *Standard Oil Co.*, 275 U. S. 257) is conclusive of the error of the Government's contention and demonstrates that such a sale is not in interstate commence. When Appellant makes a sale and delivery at its storage tanks, the purchaser then becomes the shipper.

The Government further asserts that there is a continuous movement of products from Appellant's refinery to the ultimate destination at the purchaser's place of business, and upon the basis of that assertion argues that Appellant is subject to the Act. The record shows without dispute that Appellant retains title to all products until they come to rest in the storage tanks at the three pipe line terminals; that no products are earmarked for any purchaser. When the products reach the end of the pipe line, they come to rest in bulk storage and in off seasons quantities are there accumulated to supply demands in peak seasons of consumption. Movement in so far as Appellant's pipe line is concerned ends with the products in bulk storage. All sales and deliveries are made from such bulk storage. When a purchaser buys products from storage and ships therefrom to his place of business, he becomes the shipper and sustains to the carrier chosen by him the relation of shipper to carrier. The operation cannot "be regarded as a part of through movement in interstate commerce beginning at the refinery and ending at the purchaser's place of business," as contended by the Government at page 22 of its

brief. (*Atlantic Coast Line* v. *Standard Oil Co.*, 275 U. S. 257; *Pennsylvania Railway Co.* v. *Public Utilities Commission of Ohio*, 298 U. S. 170; *Arkadelphia Milling Co.* v. *St. Louis & Southwestern Railway Co.*, 249 U. S. 137; *General Oil Company* v. *Crain*, 209 U. S. 211.)

The Government's contention that Appellant uses a price formula which includes a "specific charge for transportation."

As heretofore developed, Appellant moves Appellant-owned and controlled products, all of which are refined at its Enid refinery, by its pipe line originating at such refinery to Appellant-owned and controlled storage at its pipe line terminals. Appellant at all such times has full title to and control of these petroleum products. No part of these products is earmarked or committed for sale or delivery to a particular customer. (R. Vol. I, pp. 207, 209-210, 249)

The bulk of the sales and deliveries made by Appellant out of its storage terminals are to jobbers and other dealers. (R. Vol. I, p. 250) These purchasers furnish the transportation facilities for the movement of such products from the terminal points to their places of business. (R. Vol. I, pp. 206, 251, 258) Only on this type of sale is a "differential" involved. The f. o. b. terminal (delivered) price at which these products are sold, consists of two constituent elements:

(1) An Enid price based on certain market quotations in the Chicago Journal of Commerce, and

(2) A charge, which for lack of a better term, is called a "differential," the sole objective of which is to fix a price to individual jobbers which will permit them to compete in the market, not at the terminal point, but at their places of business. Consequently, this "differential" is not uniform in amount as to each purchaser at the same terminal. It varies in amount, depending on each jobber's competitive situation at

his place of business. (R. Vol. I, pp. 212, 215, 217, 256, 258)

The Government contends (Br. pp. 24-25) that through this differential Appellant collects from its jobbers and dealers at its pipe line terminals, a specific charge for the transportation of its products by its pipe line from its Enid refinery to these terminal points. This contention is based on the conclusion in the Commission's Report on Reargument (R. 59) that:

> "The differential, therefore, represents the charge assessed by the Champlin for transporting petroleum products through its pipe line from the refinery to the pipe line terminal."

The only evidence as to the purpose, method of calculation, and effect of this differential is the testimony of the witness Snyder (Appellant's vice-president in charge of marketing) and certain exhibits introduced in conjunction with his testimony. (R. Vol. I, pp. 212-225, 247-262) The evidence not only fails to support but directly refutes the Commission's conclusion upon the legal effect of this testimony.

To understand Appellant's pricing formula, it is necessary to understand the general price structure which prevailed in the markets in which Appellant was doing business. Some competitors were selling in these markets on a "basing point" price system, the objective of which was to reach a delivered price destination based on a quoted price at the basing point (Group 3, Oklahoma) plus "phantom" or rail freight from Group 3 to the point of destination, the products not moving by rail from Group 3 to destination, but actually moving from refineries and terminals located outside of Group 3. As deliveries were made f.o.b. company refinery or terminal, the jobber was credited with freight from actual point of shipment to destination as the jobber would have to pay this freight on acceptance of delivery at destination. (R. Vol. I, pp. 219-225) Other local

refiners were selling f.o.b. refinery without any transportational calculation entering into their f.o.b. refinery price.

Faced with this competition, Appellant evolved a pricing formula based on which it could sell to individual jobbers at an f.o.b. terminal (delivered) price which would permit each such jobber to meet competition at his place of business. In this formula, the basic Enid price was static, while the differential was flexible so as to attain the objective of reaching a delivered price which would be competitive. (R. Vol. I, p. 212)

At its Hutchinson, Kansas terminal, Appellant was faced with direct competition from local refiners. It originally set arbitrary "differential" for sales at Hutchinson at ⅜ cent per gallon for deliveries to Kansas jobbers and ¼ cent per gallon for deliveries to Colorado and Missouri jobbers. Competition from local refiners required a reduction of the differential for Kansas jobbers to ¼ cent per gallon and the complete elimination of the differential for Missouri and Colorado jobbers. (R. Vol. I, p. 212)

At its Superior, Nebraska terminal on deliveries to Nebraska jobbers and at its Rock Rapids, Iowa, terminal, Appellant in effect followed the competitive "basing point" practice by setting its differential at the difference between established rail rates from Oklahoma to points in Nebraska and the newly-established rail rates from Superior to such Nebraska points. As the Court well knows, a "basing point" price is a delivered price and is not based on a specific transportational charge. As established rail rates were not available from the Superior terminal to points in Colorado, Wyoming and the Dakotas, a differential was adopted arbitrarily at ½ cent per gallon for deliveries to jobbers located in these states, along with Iowa. (R. Vol. I, pp. 212-215)

These differentials were adjusted from time to time as competitive conditions changed. (R. Vol. I, pp. 212-215)

To contend that these differentials represent a charge to others for the transportation of products by pipe line is obviously fallacious, because:

(1) They were never identified as charges for transportation. (See invoices, R. Vol. I, pp. 392-399)

(2) No showing was made that they in any way reflected or bore any relationship to the actual cost of transportation. In fact, they were arbitrarily directed at reaching a competitive price.

(3) They were not uniform in amount as to purchasers accepting deliveries at the same terminal. At Hutchinson, for example, Missouri and Colorado jobbers paid *no* differential; Kansas jobbers paid a differential of ¼ cent per gallon. At the other terminals, similar variances existed depending on the individual competitive situation of the jobber at his place of business. How can it reasonably be contended that these differentials were intended to be or are in effect charges for transportation, where there is no uniformity in amount for the same movement between the same points?

(4) It is true that certain established rail rates were on some deliveries considered in fixing these differentials. The basic rail rate so considered was the established rail rate from Group 3 to the location of the jobber's business. No products moved, either by rail or by pipe line, between Group 3 and the jobber's business location. Such rail rates were used merely as a basis for calculating a delivered price, not as a charge for transportation.

(5) It is true that the cost of moving its petroleum products to the terminal points was undoubtedly considered by Champlin in arriving at its ultimate f.o.b. (delivered) terminal prices. But to say that this ultimate delivered price or its constituent elements represents a specific charge for transportation, is no more sound than to say it represents a specific charge for producing the crude which went into the refined products, a specific charge for refining, a specific charge for marketing, and a specific charge for the other elements of cost which go into the final cost of Champlin's finished products.

Snyder's testimony and the exhibits introduced in connection therewith are clear. No conflicting evidence was

offered or introduced. It demonstrates that the purpose, method of calculation and effect of these differentials were to reach an f.o.b. (delivered) terminal price to jobbers and dealers which would permit them to be competitive. It did not involve a charge for transportation, either specifically or as a concealed constituent element in this delivered price.

The Government's contention that Appellant cannot enjoy the benefits while disclaiming the burdens of common carrier status. (Br. 28)

The assertion that Appellant having enjoyed some of the rights and privileges of a common carrier cannot complain of the attendant burdens is founded primarily on the facts that,

(1) construction of the pipe line was commenced by Cimarron Valley Pipe Line Company, a common carrier, which had the right to exercise the power of eminent domain;

(2) Cimarron filed four condemnation proceedings (which were dismissed and satisfactory and complete settlements made with the land owners before the line was completed, so that all right-of-way was acquired by purchase); and,

(3) one of the Iowa permits authorized Appellant to exercise the power of eminent domain.

A short answer to the entire contention is that none of the rights or privileges of a common carrier have been exercised by Appellant.

At the outset of our response to this argument, we refer the Court to the finding of the Commission that the right-of-way was acquired by purchase and that Appellant never assumed or exercised the power of eminent domain. (R. Vol. I, p. 60.)

In the Argument, the Government speaks (Br. p. 28) of Cimarron Valley Pipe Line Company as Appellant's *alter ego*. There is no basis in the record for the assumption that the separate identity of the two corporate entities was not,

or is not, preserved in all of their dealings. Cimarron did file certain condemnation suits. They were not prosecuted to conclusion nor was a taking effected by them. No property was acquired in any state by condemnation proceeding. The four proceedings commenced by Cimarron in Kansas were dismissed before awards were made and "*satisfactory* and *complete* settlement was made with all of the contesting land owners" (R. Vol. I, p. 200), and the innuendo appearing in the Government's brief (p. 29-30) is unjustified. Further, only the land owners could complain if they were overreached in acquiring the rights of easement. The Government is without interest or jurisdiction in these purely intrastate proceedings.

One of the Iowa permits issued to Appellant did provide for the exercise of the power of eminent domain (R. Vol. II, p. 829), but the power was never exercised. The permit was surrendered and a new permit was issued, expressly excluding the power of eminent domain. The Government argues that since the first permit authorized the exercise of the power of eminent domain (although the power was never exercised), the Court is justified in holding that Appellant is a common carrier engaged in transportation under the Act.

The charter of the Uncle Sam Company authorized it to act as a common carrier, which would include the right to exercise the power of eminent domain, but that fact evidently was not regarded by this Court as sufficient basis to hold that company a common carrier under the Act. Actions, not powers, are the important factors in what determines a common carrier in fact.

This Court has held that,

> "Whether a transportation agency is a common carrier depends not upon its corporate charter or declared purpose, but upon what it does." *U. S.* v. *California*, 297 U. S. 175.

The argument was made in the *Pipe Line Cases, supra*, that the Uncle Sam Company should be required to assume

the burdens of a common carrier, because it had laid its line over Indian lands under regulations prescribed by the Secretary of the Interior, providing that every pipe line so laid should be required to become a common carrier. (R. Vol. II, p. 711.) But this court rejected such argument and held that the Uncle Sam Company was not subject to the Act because it was not a common carrier in fact.

The Government also asserts that the new or amended Iowa permit authorizes Appellant to use the property of others, and thereon argues that the burdens of a common carrier may properly be imposed upon Appellant. The facts are that this permit does authorize Appellant to cross public highways, with consent of the proper public officials, to cross railroads and to acquire property rights from others, but it expressly withholds the power of eminent domain. The authority so granted can be exercised only by consent of those in control of the highways and by private agreement with railroads and other owners of private property. The authority so granted has been exercised only in strict conformity to the terms of the permit. Neither the type of permit nor what has been done under it has ever been held a basis for determining a holder to be a common carrier or for imposing the burdens of such a carrier.

At another place in its brief the Government directs attention to the fact that the purpose clause of Appellant's charter includes the power to "transport petroleum," as if the existence of this power were a basis for holding Appellant subject to the Act. The Uncle Sam Company had the broader power to act as a common carrier. It did not, however, act as a common carrier or as a carrier for others; and notwithstanding its corporate character, its charter power and its operation of an interstate oil-carrying pipe line, it was held not to be within the reach of the Act.

In support of its contention that the burdens of a common carrier are attendant upon the assumption of the benefits of a common carrier, the Government cites the case of *Pierce Oil Corp.* v. *Phoenix Refining Co.*, 259 U. S. 125, which held

that the State of Oklahoma could compel Pierce Oil Corporation to become an *intrastate* common carrier because it had *accepted* the benefits conferred by the state laws, and had entered the state under a statute *requiring it to become a common carrier.* The issue of whether Pierce Oil Corporation was thereby made an *interstate* carrier was not, and obviously could not be, an issue in the case. That is a subject of Federal jurisdiction solely. Here no benefits have been conferred upon Appellant by the Federal Government, hence there are no corresponding obligations. (*Buck* v. *Kuykendall*, 267 U. S. 307.) The mere fact that a company is an intrastate carrier does not make it an interstate carrier. The latter status is impressed only when the company is an interstate common carrier *in fact.*

The fact that Champlin's wholly-owned subsidiary, Cimarron Valley Pipe Line Company, originally secured a certificate of authority and convenience "to transact the business of a common carrier in the *State of Kansas*" has no bearing on Champlin's status except that its withdrawal therefrom with express authority of the State of Kansas (R. Vol. I, p. 433) and its transfer to Champlin of the pipe line and all appurtenances (R. Vol. I, p. 280A) before completion of the line made it abundantly clear that the line was to be operated as a private line.

The Government's contention that the order violated no constitutional right of Appellant.

Appellant directs attention to its brief, pp. 40-60, upon this question and in addition desires to make the following further statement with regard to the Government's contention, (Br. pp. 31-32).

Reliance is placed by the Government upon the Valvoline case as an answer to all questions affecting the constitutionality of the Act as it has been applied by the trial court, and as the Government would have this Court apply it. *Valvoline* was held to be a common carrier because it carried for others and thereupon this Court found that the

power of the Commission to require valuation data under Section 19a did not present any serious question of constitutional invasion. As presented in this case the constitutional question runs deeper. Here there is no carriage for others and Appellant contends that an attempt to subject it to any of the provisions of an act which does not apply to its operations, would be unreasonable and arbitrary. The requirements of due process are not met in such attempt. In such case, the violation of due process is substantive and not procedural and to attempt to enforce compliance with a regulation based on a statute to which Appellant is not subject, raises in itself the issue of due process.

Products pipe lines.

Appellant deems it necessary to give affirmative consideration to products pipe lines which are to be distinguished from "crude" oil pipe lines, inasmuch as the development of their use long followed the adoption of the Hepburn and the 1920 Amendments, and could not have been in contemplation by Congress at the time of the enactment of such amendments. The factual background of such pipe lines is important,

> First, as to the development of gasoline manufacture which represents a transition from nuisance to necessity, and
>
> Second, as to the change, about 1930, in the state of the art of pipe line construction, which enabled the refiner to utilize the welded seamless steel pipe line as an economical and satisfactory means for the transportation of gasoline.

In Boyd's "Gasoline and What Everyone Should Know About It" it is said, at pages 9 and 10, that:

> "* * * there was such an excess of gasoline during the years before the automobile came into use, that its

> disposition was one of the biggest worries of the refiner. He was glad to dispose of it at any price and thousands of gallons were sold at a fraction of a cent a gallon, to say nothing of the immense quantity that was thrown away because there was no demand for it at all."

and that,

> "* * * As late as 1906, only about 100,000 automobiles were in service."

That was the status in 1906 of the extent of the demand for gasoline as fuel for use in the internal combustion engine when Congress began consideration of the Hepburn Amendment to the Transportation Act of 1887. The words "oil" and "pipe line" were not contained in the Transportation Act of 1887.

In *Church of the Holy Trinity* v. *United States*, 143 U. S. 457, it was held that:

> "A thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers,"

and

> "* * * Another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed and as it was pressed upon the attention of the legislative body."

The legislative history of the Hepburn Amendment, for the purpose of demonstrating its intent, was set forth at length in the Government's brief in the *Pipe Line Cases* (234 U. S. 548) and is reprinted at pages 713-723 in Volume II of the record in this case. Congress was considering abuses *monopolistically* practiced against *well owners* to

their detriment in their effort to find an outlet for their crude oil.*

This statement requires a comparative definition of "crude" (or rock) oil, technically called petroleum which may be said to be of either "paraffin" or "asphalt" base and has been defined to be a complex mixture of carbon and hydrogen in chemical combination, which differs from a definite chemical compound such as alcohol in that the petroleum molecules, which are inconceivably minute, are not all of the same size. The smaller and lighter particles of petroleum, which are separated and refined, we call gasoline.

Congress was not dealing, nor intending to deal, with the transportation of such type of refined product in its consideration of the Hepburn Amendment, as is fully shown in the debates (R. Vol. II, pp. 713-723) to which reference has just been made, and most certainly could not have been in-

* There is one thing that is certain in this case; viz., that there are no *monopolistic* features in the limited products pipe line operations of this small independent refining company, *wholly owned* by the members of the family of the late H. H. Champlin (R. Vol. I, p. 167), which has but 3½ per cent of the sales of the industry in the area served by the pipe line (R. Vol. I, p. 49). The lack of the important element of monopolistic control so necessary in the creation of the common law status of common carrier "in substance, if not so in form," of which Mr. Justice Holmes was speaking, is evidenced by the unquestioned failure of the Government at any place in its brief, to discuss such important question or to make any claim as to common law status of common carrier upon the Appellant's part, other than that it

(a) crosses state lines and public highways;

(b) makes a "specific charge for transportation" (which incidentally it does not do);

(c) and is engaged in hauling its manufactured *products* to a point where they are stored in off season awaiting their sale upon an open market, in the seasonal peak demand for such products.

It should also be remembered that Appellant does not own or operate any other pipe line of any kind and is not authorized by its charter to transport by pipe line as a common carrier.

tending to include within the terms of the Amendment the regulation of the transportation of gasoline by pipe line in the then state of the art of pipe line construction.

Transportation of refined petroleum products by pipe line was, at the time of the adoption of the Hepburn Amendment, twenty-four years in the future and had not been dreamed of in that early period of automobile development. Furthermore, the adoption of the 1920 Amendment was ten years in advance of the products pipe line development.

Congress was dealing with abuses being practiced in the transportation of "crude" (or rock) oil for manufacturing purposes and was not concerned in the least with the regulation of the disposal upon the market of refined products (not then in general use) which, after the same come to rest in storage tanks, remain at all times the property of the manufacturer until sold.

In Technical Paper No. 516, U. S. Department of Commerce *1932*, it is said:

> "Motor gasoline has been transported about refineries and from refineries to loading racks and docks by means of pipe lines ever since this fuel has been in demand. Pipe line systems for transporting motor gasoline from refineries to distribution centers have, in the past, been repeatedly discussed by refiners and marketers; until recently, however, the plans were dropped as unfeasible. Several years ago a group of Mid-Continent refiners considered the construction of a cooperative motor-gasoline line to extend from Oklahoma to some Mississippi River point, but the line was never built. The chief objection raised at that time to such a system was that gasoline specifications used by the various refiners was not uniform; as it was believed that all grades of gasoline would be mixed in pipe line movement no refiner could be sure that he could withdraw from the system gasoline that would meet his specifications. Since the promulgation of United States Government master specifications for liquid fuels, which many states have adopted, this objection has been largely overcome. Also it appears that by proper operation of the lines gasoline of various grades can be transported without mixing to an appreciable extent.

> "On February 1, 1930, the Standard Oil Company of New Jersey began to transport motor gasoline inland through its Tuscarora pipe line from its Bayway refinery, on New York Harbor, to various points in New Jersey and Pennsylvania, according to a personal communication from E. J. Lewis, president, Tuscarora Oil Co. (Ltd.). The pipe line had formerly been used to transport crude oil from fields in western Pennsylvania to the Bayway refinery. This line is approximately 371 miles long and is a common carrier. It is the first long line ever used for the transportation of motor gasoline from a refinery to markets."

It has also been said by the Interstate Commerce Commission in *Petroleum Rail Shippers Ass'n* v. *Alton & Southern Railway*, 243 I. C. C. 589, No. 28106, decided March 1, 1941, that:

> "Prior to the perfection of the process of electric welding, pipe line transportation was practically confined to (the) crude oil. That process has made possible the transportation of refined petroleum without loss by reason of imperfect pipe joints; and as a result, since 1931 there has been a rapid growth of gasoline pipe lines."

The regulation of a pipe line such as is here involved in its use for the transportation of refined petroleum products such as gasoline, kerosene and Diesel fuel, being unknown in 1906 when the Hepburn Amendment was passed, and having never been employed prior to the passage of the 1920 Amendment, could no more have been in contemplation by Congress, than was the regulation of power impulses through ether (radio) in mind when telephone and telegraph communication was first considered for regulatory legislation.

The Congress recognized the change in the state of the art of communication by the invention of the radio and legislated accordingly. In a note (40 A. L. R. 1514) upon the subject, "Legal Aspects of Radio Communication and Broadcasting," it is said:

> "Congress, under its power to regulate foreign and interstate commerce, *assumed control of radio* communication and, after the conclusion of an international convention between the United States and most of the other countries of the world, provided for the enforcement of the provisions of such convention by the enactment of the Act of August 13, 1912, (37 Stat. at L. 302, Chap. 287, Comp. Stat. §10, 100 to 10,109, 9 Fed. Stat. Ann. 2d ed., p. 524). Further regulations were made by the Resolution of June 5, 1920 (41 Stat. at L. 1061, Chap. 269, Fed. Stat. Ann. Supp. 1920, p. 261) and the Resolutions of April 14, 1922 (42 Stat. at L. 495, Chap. 132, Fed. Stat. Ann. Supp. 1922, p. 307), and February 28, 1925 (43 Stat. at L. 1091, Chap. 378)."

Congress was laboring, in the passage of the Hepburn Amendment, as well as in the passage of the 1920 Amendment, to afford well owners a means for the transportation of their "crude" oil. It was not concerned with marketing problems of manufacturers.

The latter subject, if it needs regulation, is now open for legislative attention. It certainly is not open for regulation upon judicial fiat by the courts or commissions.

That grave doubt existed in the Interstate Commerce Commission as to its right to regulate petroleum products pipe lines, is evidenced by the fact that such lines had been in unregulated use for some eleven years, when on February 7, 1941, a divided division of the Commission (Splawn dissenting) determined that:

> "* * * the bureau of valuation proceed either against the Champlin Refining Company or the Standard Oil Company of Indiana in such manner as will bring before the Commission the question of jurisdiction under Section 19a for the purposes of a *test* case." (R. Vol. II, p. 526.)

An operation which was considered physically unfeasible at the time of the enactment of a statute cannot be considered to be within the intent of the statute, even if within its words.

CONCLUSION.

There are a number of statements in the Government's brief which will be identified, which require special notice:

First, (Br. p. 26) it is said:

> "* * * It was expressly held in the *Pipe Line Cases*, 234 U. S. 548, 560, that the application of the Act could not be circumvented by the artifice of requiring that transfer of title take place prior to the commencement of transportation over the pipe line. Similarly it would seem clear that appellant should not be permitted to defeat the applicability of the Act by requiring that transfer of title take place only after the transportation by pipe line has been completed."

The implication in the above statement that the Appellant is employing an artifice by requiring transfer of title to take place only after transportation by the pipe line has been completed, is completely unjustified. The Appellant can not transfer title until a sale has been made. There is no relationship in principle or otherwise in what the Standard and affiliated companies were doing in the *Pipe Line Cases* and what the Appellant is doing in this case. The Standard was buying crude oil for manufacturing purposes; the Appellant is selling manufactured products. The Standard was dealing with producers who were without other practical means of transportation. The Appellant deals with a consuming world which is privileged to purchase like products from any number of manufacturers who offer for sale an equally satisfactory product at exactly the same price.

Second, it is further said on page 26 of the Government's brief, with reference to the *Pipe Line Cases*, that,

> "* * * This Court held that it would be 'a sacrifice of fact to form' to exempt them on that account from compliance with the Act (234 U. S., at 560). The same would be true here if appellant were permitted to obtain exemption from the regulatory statute by the de-

vice of imposing, as a condition to the transportation by means of its pipe line, a sale to be consummated upon completion of the transportation."

To say that Appellant is attempting to obtain exemption from the Interstate Commerce Act by the *device* of imposing as a condition to the transportation by means of its pipe line, a sale to be consummated upon completion of the transportation, is so at variance with the letter as well as the spirit of this record as to scarcely require answer.

The Appellant is transporting products to its storage tanks for sale to customers in a territory that it cannot otherwise competitively reach and it must store these products in off season to have same available in the peak season, because the capacity of the pipe line is not sufficient to meet the seasonal peak demands. It is interested in selling its products to keep its company alive, and as to sales there is no condition as to transportation. As the refinery manufactures the product and the small plant storage tanks must be emptied, the product as a mere refinery operation is put into the pipe line and taken to the larger storage tanks at the places indicated as a means of availing the refinery of storage distantly located. Particular sales to be consummated in the future could not then possibly be in contemplation, having nothing in the world to do with the operation of such products pipe line. It is a mere matter of refining operations until storage.

Third, at the top of page 27 of the brief, it is said:

"* * * The only distinction between the two situations is that appellant is transporting petroleum products from its refinery to market for sale, instead of crude oil to its refinery after purchase. It is submitted that this distinction is productive of no difference in the legal result, and that in this case the result follows *a fortiori*, for a company transporting crude oil might much more plausibly assert that what is transported was simply raw material for its own use at its refinery than appellant could claim that finished products moving to the market were

destined for its own use. The fact that the commodity transported is refined petroleum products instead of crude oil is, in itself, obviously immaterial * * *."

It is argued that the difference between the Valvoline operation and the Appellant's operation is merely one of type of material and that a company transporting crude oil might much more plausibly assert that what it transported was simply raw material for its own use at its refinery (the Uncle Sam case). The Appellant has never claimed that the products of its refinery were being transported to its storage tanks *for its own use.* The Uncle Sam Company was not transporting any crude oil for its own use in any sense such as the Government argues in this case. We refer to R. Vol. II, p. 829, as to just what the Uncle Sam operation was. We quote:

> "* * * It owns and operates a pipe line, with storage tanks, from its wells in the reservation in the State of Oklahoma to its refineries in Cherryvale, Kansas. Through the agency of a selling corporation, the capital stock of which it owns, it ships its refined product in tank cars, owned by it, from its refinery at Cherryvale to stations owned by it in the State of Missouri. * * *"

There has been much lack of technical information involved in the Government's consideration of the words "for its own use," for throughout this litigation, the construction placed upon the words so used by Mr. Justice Holmes have been interpreted as meaning for instance the "greasing of machinery or the firing of the boilers." The obvious fact that crude cannot be used for either purpose unless at least partially refined has been wholly ignored. Of course, the Uncle Sam operation from well to consumer is exactly the operation of the Appellant from well to consumer, the only difference being that in the Uncle Sam case the raw product was coming into the refinery and in the Appellant's case the finished product was leaving the refinery. The Appellant would hardly be expected to concede that it was

storing its finished products in its storage tanks at Hutchinson, Superior and Rock Rapids *for its own use*, and neither will it be contended that the Uncle Sam Company was transporting its refined products to Missouri for *its own use*.

Fourth, at the bottom of page 27 of the brief, it is said:

> "* * * It would be artificial to draw a distinction because appellant is selling to the public, instead of purchasing from the public as Valvoline did. * * *".

The Appellant does not draw such distinction. There is no relation whatever in the operations of the Valvoline Company and the Appellant. The Valvoline operations in principle were the operations of the Standard and affiliated companies in the *Pipe Line Cases*. The operations of the Appellant and the operations of the Uncle Sam Company are in principle similar operations. The Government has never been able to handle the decision of this Court in the Uncle Sam case. It does not handle that decision in this brief. It chooses to talk about Valvoline when it should be talking about the Uncle Sam Company, for Valvoline does not present the related principle nor the related question. The truth of the matter is that the Uncle Sam opinion of this Court cannot be handled consistently with the Government's position, and to affirm the trial court's judgment requires the overruling of the *Uncle Sam* decision which was approved by Mr. Justice Reed in the *Valvoline* case.

Fifth, in connection with certain condemnation cases which were instituted by the Cimarron Company as a result of erroneous advice by one of the Appellant's counsel, which cases were later dismissed and satisfactorily settled, it is said, at the bottom of page 29 and at the top of page 30 of the brief:

> "* * * These suits were later dismissed (R. 176, 200, 277-80); but the record does not disclose whether the

owners of this land were ever notified that appellant's counsel had concluded that its subsidiary should relinquish and disclaim its common carrier status in Kansas. The fact that the property was acquired by settlement of the pending suits, rather than by consummation of the eminent domain proceedings is immaterial under 'the rule, that settlement by an eminent domainer, with one whose property has been appropriated, is equivalent to the full and complete exercise of the power of eminent domain.'"

The difficulty with this statement is that it is subject to an implication which impugns Appellant's good motives and good faith. The truth of the matter is that the entire transaction from the date of the first activity by the Cimarron Company in connection with the pipe line to the day of the completion by the Appellant was carried out with the highest standards of ethical business conduct. The Cimarron Company, which was without funds, was selected to build the line because the management were told that the line had to be a common carrier line in the State of Kansas. When it was learned that that statement was not correct, and the subsequent records show that the authorities in the State of Kansas so ruled, the Cimarron Company was taken out of the picture immediately. Its debt to the parent company, the Appellant, was taken off the Champlin books. The seven landowners that had been sued in four suits were satisfactorily and completely settled with. That is the record; and furthermore the line was completed by the Appellant who operated it from the first day of its use, a perfectly honorable transaction from beginning to end.

Sixth, it is true that in Iowa a permit was obtained to build the line through two counties in that state to the small town of Rock Rapids. However, the line was completed through the two counties wholly by purchase of right-of-way and by dealings with the local (public) authorities and had been completed before the Appellant discovered that the permit carried with it the right to exercise eminent domain. Eminent domain had not been exercised and the line

had been completed, which made it unnecessary to utilize eminent domain; but nevertheless the company, maintaining a consistent position, notified the authorities in Iowa that the company had no use for such permit and asked that a permit be substituted which would eliminate the eminent domain provision. The authorities in Iowa promptly granted the second permit, eliminating the power of eminent domain, and that is the way the record stands. And again we inquire as to the justification of the implications in the statement (Br. p. 30):

> "* * * While no condemnation suits were brought in Iowa, it is a reasonable supposition that the authority to exercise the right of eminent domain in Iowa, which appellant enjoyed for over a year and a half, as well as the pending suits in Kansas, facilitated the purchase of the needed lands at prices favorable to appellant."

There is not a word in this record of any short dealing by the Appellant on a single foot of right-of-way from Enid to Rock Rapids, a distance of 516 miles, and the Appellant has furnished for the record the detail of the legal title to and the authority for the use of every foot of that right-of-way in so far as public highways and the crossing of the Missouri River, for which authority was obtained from the War Department, are concerned. The record is silent as to any litigation or controversy in any instance. As a matter of fact, the line was being built in a hurry. It had to be. And when a line is being built on the basis of purchase of private easements, the land owner must be settled with before the purchaser may go upon his land, so everyone had to be satisfied before the ditch-digging machine could go forward.

The Government undertakes to put the status of a common carrier on this company on the basis of

> (a) hauling its own products to storage places awaiting a day when it hopes to be able to sell such products,

and

(b) upon the manner in which it obtained its right-of-way,

upon which activity not a word of criticism appears in the entire record.

WHEREFORE, it is respectfully submitted that the judgment of the trial court should be reversed and injunction should issue restraining enforcement of the order issued by the Interstate Commerce Commission against Appellant, all as prayed for in Appellant's amended petition; and Appellant now prays for the judgment of this Court accordingly.

Respectfully submitted,

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